

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

MID-WEST TELEPHONE SERVICE, INC.

and

CASE

8-CA-38901

WILFREDO PLACERES, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE

8-CA-39168

DUSTIN PORTER, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASES

8-CA-39297

8-CA-39388

BEN FANNIN, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE

8-CA-39334

MIKE WILLIAMS, AN INDIVIDUAL

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S BRIEF IN RESPONSE TO
RESPONDENT’S OPPOSITION TO THE ACTING GENERAL COUNSEL’S MOTION
TO DISMISS RESPONDENT’S APPLICATION FOR ATTORNEY FEES UNDER THE
EQUAL ACCESS TO JUSTICE ACT**

Pursuant to Section 102.150 of the Board’s Rules and Regulations, the undersigned
Counsel for the Acting General Counsel files this Brief in Response to Respondent’s Opposition

to the Acting General Counsel's Motion to Dismiss Respondent's Application for Attorney Fees (the Application) under the Equal Access to Justice Act, 5 U.S.C. §504 et seq. (EAJA).

The Application should be dismissed in its entirety for the reasons stated in Counsel for the Acting General Counsel's Brief in Support of Motion to Dismiss Respondent's Application, and for the reasons set forth more fully below.

I. RESPONDENT'S APPLICATION SHOULD BE DISMISSED BECAUSE RESPONDENT DOES NOT QUALIFY FOR RELIEF UNDER EAJA BECAUSE IT WAS NOT A "PREVAILING PARTY"

To be eligible for reimbursement of fees under EAJA, an applicant must be able to demonstrate that it was the "prevailing party" in the adversary adjudication. *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); Section 102.143(b) of the Board's Rules and Regulations. The burden is on the party seeking fees to establish that it is a prevailing party. *Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 150 (4th Cir. 1996).

Both enforceable judgments on the merits and court-ordered consent decrees can produce a "material alteration of the legal relationship of the parties" necessary to create a "prevailing party." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989). An award of attorney's fees can be appropriate in cases where the matter was settled pursuant to a private settlement, but only in instances where the case was settled by entry of a consent decree. *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 n.7 (2001); *Farrar v. Hobby*, 506 U.S. 103 (1992). As the Court has noted, "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." 532 U.S. at 604 n.7.

In his decision, Judge Carissimi approved Placeres' request to withdraw the portion of his charge pertaining to his discharge pursuant to a private settlement agreement with which Respondent had already complied. Here, there was no consent decree that created a court-ordered, "change in the legal relationship of the parties" that is required before attorney fees will be awarded. 489 U.S. at 792-793. Nor did Judge Carissimi's approval of the withdrawal necessitate any continuing oversight of the settlement. Consequently, Respondent has failed to meet its burden that it is a "prevailing party" in the underlying proceeding and its Application should be dismissed.

II. RESPONDENT'S APPLICATION SHOULD BE DISMISSED BECAUSE RESPONDENT IS NOT ENTITLED TO RELIEF UNDER EAJA BECAUSE THE ACTING GENERAL COUNSEL WAS SUBSTANTIALLY JUSTIFIED IN REFUSING TO GRANT CHARGING PARTY'S WITHDRAWAL REQUEST

Respondent argues in its Brief in Opposition that Counsel for the Acting General Counsel had no "reasonable basis" to continue the litigation in light of settlement agreement and Wilfredo Placeres' desire to withdraw his charge. In support of this argument, Respondent points to its counsel's communications with the undersigned Counsel for the Acting General Counsel in July 2011 during which the undersigned informed Respondent's counsel that approval of Placeres' withdrawal request would be recommended to the Regional Director.

The foregoing communication has no relevance to the determination of whether the government was substantially justified in prosecuting the underlying case. A Regional Director has the discretion to deny a withdrawal request based on a settlement between the parties after considering the standards set forth in *Independent Stave Co., Inc.*, 287 NLRB 740 (1987). *See*, NLRB Casehandling Manual Part One, Unfair Labor Practice Proceedings, Section 10142.

As set forth in detail in Counsel for the Acting General Counsel’s Brief in Support of Motion to Dismiss the Application together with the Board’s holding in *Independent Stave*, the Regional Director was substantially justified in denying Placeres’ withdrawal request and Counsel for the Acting General Counsel was more than substantially justified in opposing approval of the non-Board settlement. Any communications between counsels about the Board Agent’s recommendations to the Regional Director have no relevance to any finding of substantial justification.

III. THE APPLICATION SHOULD BE DISMISSED BECAUSE IT DOES NOT ITEMIZE EXPENSES

A fee applicant bears the burden of documenting and submitting the appropriate hours expended. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Any claims upon which an applicant did not prevail, and which are “distinct in all respects” from claims upon which it did prevail, “should be excluded in considering the amount of a reasonable fee.” *Id.* at 440. In *Hensley*, the Court admonished fee applicants that they “should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” *Id.* at 437.

However, Respondent’s counsel, the law firm of Morrow & Meyer LLC, did not adequately identify and document its fees and expenses with regard to the Placeres charge. Morrow’s practice with respect to its billing records was to list everything its attorneys did on a given date and to list the total number of hours worked on issues related to the entire adversary adjudication, without identifying the amount of time spent on matters regarding the Placeres charge. In an effort to overcome this lack of detail, the Application petitioned for an amount equal to one quarter of the total number of hours.¹ This is clearly insufficient.

¹ Respondent’s attempt to estimate the hours Morrow dedicated to the Placeres charge is also mathematically flawed: five (5), not four (4) cases were consolidated.

Accordingly, Respondent is not entitled to fees under EAJA because its Application fails to identify and adequately document expenses incurred by Morrow in connection with the adjudication of the Placeres charge.

V. CONCLUSION

For the foregoing reasons and for the reasons set forth in Counsel for the Acting General Counsel's Brief in Support of Motion to Dismiss the Application, Respondent's Application should be dismissed.

Respectfully submitted,

/s/Melanie R. Bordelois
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PROOF OF SERVICE

On December 19, 2012, Counsel for the Acting General Counsel's Brief in Response to Respondent's Opposition to Acting General Counsel's Motion to Dismiss Respondent's Application was E-Filed on the Board's website, with a copy served on Respondent via electronic and regular U.S. mail at:

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Also on December 19, 2012, a copy of Counsel for the Acting General Counsel's Brief in Response to Respondent's Opposition to Acting General Counsel's Motion to Dismiss Respondent's Application was sent via regular U.S. mail to the following:

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